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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 349

GILBERT E. THIEL,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

Answer to Petition for Certiorari

The petition fails to show a case within Rule 38. All that can be said is that it presents two questions of fact: (1) Whether the finding of the jury, that there was no negligence on the part of Southern Pacific Company, was correct[1] and (2) whether the finding of the District Judge,

1. The petition asserts a conflict with *Calloway v. Hart*, 146 F2d 103 (CCA 5). There is none. The *Calloway Case* held only that, on its facts, the question was for the jury. Here the question was submitted to the jury.

that there was no improper exclusion of any eligible class of persons in putting names into the box from which the petit jury panel were drawn, was correct.[2]

The petition is remarkable for three things: (1) Mis-statement of the case (a) in instances by selecting and garbling only portions of the testimony deemed favorable to petitioner[3] and (b) in other instances by affirmative mis-statement[4], (2) avowed excursions outside the record[5]

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2. The same rule, that all intendments must be made in favor of the determination of the trial court, that applies to findings of fact generally, applies to the finding on this issue. (*Thomas v. Texas*, 212 U.S. 278, 281, 53 L. ed. 512, 513.)

3 On the issue of negligence this is particularly true of the testimony of defendant's ticket agents Forsythe and Wogan, of policeman Sorenson, of the conductor Cosgrave, and of the brakeman Sherman. The treatment of their testimony is such as to misrepresent it.

The same is true of the testimony of the Clerk and the Jury Commissioner. This is dealt with below, in some detail, in justice to them.

There is too much to give the detail here.

4. Here are a few examples: Petitioner was given no opportunity to state objections to proposed instructions (petition p. 29). This is flatly contradicted by the record. (R 209, 968, 970, 972-984) "Court: Do counsel desire to take any further exceptions? Mr. Spivock (petitioner's counsel): Nothing so far as plaintiff is concerned." (R 970)

Misstatement of 28 USCA §413 (petition p. 35). It had been set out in full in Appendix A to respondent's brief in the court below.

Statements that respondent had been "informed" of petitioner's mental condition (petition 3). This is a perversion of an allegation in the answer, made on information and belief.

Petitioner did not know the train was moving when he went out the window. His own testimony shows he knew it had left Reno and was in motion. (R 677, 669; cf. 635, 636).

The conductor would not have accepted petitioner as a passenger if informed of his condition (petition 11). The conductor's testimony did not deal with petitioner, but with a hypothetical case.

Petitioner looked drunk (petition pp. 10, 14). One witness who saw petitioner on Sunday morning, over 8 hours before he jumped out the train window, said that he *then* looked like a man who

and (3) complete failure to appreciate that all questions of fact (determination of conflicts in the evidence and determination of what inferences should or should not be drawn) have been resolved by the triers of fact.

About 8:40 P.M. on Sunday, February 25, 1940, petitioner, his wife and a friend, Johnny Morris[6], boarded Train No. 9 at Reno, Nevada, to go to San Francisco. The train left about 8:50. Twenty-five minutes later, pe-

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had been drinking and was getting over a hang-over. (R. 734-737, 740) No one said petitioner looked drunk. In fact he was not drunk. See below.

The signal to stop the train was given only after petitioner had fallen (petition p. 12). The testimony of brakeman Sherman squarely contradicts this (R 799, 803, 810, 813, 819, 822), and was corroborated by that of passenger Buck (R 693-696).

The defendant "admitted" various things attributed to it (various places in the petition). The defendant admitted nothing of the sort. Its employees testified to the facts.

Forsythe and Wogan knew plaintiff was acting crazy (petition p. 40). Both testified they saw nothing abnormal about petitioner—he seemed normal—talked and acted coherently and rationally. (R 734-737, 740, 743, 745, 750, 751, 759, 760, 744.)

5. **Examples:**

A statement attributed to Juror Gale of his relations to Mr. McDonald, formerly president of respondent. There is no such statement in the record. There could not be. Mr. McDonald died a year before this case went to trial.

A conversation with a juror in 1944, over a year after the case was tried.

A reference of jury selection matters to the Attorney General. This follows a pattern set by the attorney for petitioner when he loses a case. Fairly recently, having lost a matter before the U. S. Tax Court, he endeavored to have the presiding member removed.

Asserted proceedings of the Central Council of Civil Clubs and San Francisco Board of Supervisors. The attorney for the petitioner (who obviously prepared the papers for petitioner's signature) should have stated his connection with the asserted proceedings—that he was a past president of this "civic club" and that he instigated and took the lead in the proceedings referred to.

A statement attributed to Judge Bowen for which there is no support in the record.

6. Neither Mrs. Thiel nor Morris was called as a witness.

titioner, without warning, "suddenly"[7] opened a window of the train and leaped[7] out, while the train was in motion.

Petitioner, his wife, and Morris had been in Reno the preceding week (R 512, 537, 642-644, 650, 651). Petitioner had been drinking and gambling. At places the record indicates that he had his last drink on Friday, the 23d, at other places that he had something to drink on the morning of Saturday, the 24th (R 512, 644-649, 651, 652, 654). It is clear that he had nothing to drink for over 24 hours before he jumped out the train window (R 651-654). There is no evidence even tending to show that he was intoxicated when he boarded the train or when he jumped.

Petitioner testified in detail to all of his actions during the week before the accident, and on the day of the accident up to the time he jumped from the train. He said he was testifying from his own recollection, not from what someone told him (R 663, 664). He claimed he had had hallucinations and was in fear of injury.[8] The evidence shows: He got up about 6:00 a.m. on the day of the accident, and walked around Reno alone, before sun-up.[9] (R 655-657). His speech was normal, coherent and rational. He was fully oriented. He appreciated and remembered the details of his surroundings, who he was with, where he was going, and that having run out of money it was necessary to get some to obtain tickets. He directed the obtaining of money by phoning to San Fran-

7. These characterizations are petitioner's. (R 20, 500.)

8. But neither he nor anyone else testified to any *fact* indicating any mental disturbance, at least up to the very moment he went out the train window. See second paragraph of note 19 below.

9. This is certainly inconsistent with a claim of being in fear of injury from gangsters.

cisco and having it wired. There was no loud talking or boisterous or unruly conduct. There was no gesticulation or commotion. His appearance and movements were normal. He required no assistance. He appreciated that he was getting on a railroad train and boarded the train willingly. He appreciated that he was on a train, and after it left Reno, that it was in motion.[10]

On the day of the accident, petitioner was observed by two ticket sellers, Forsythe and Wogan, by Sorenson, a railroad police officer, and by passenger Rippetoe, petitioner's witness.[11] There was nothing about him abnormal in appearance or conduct. He was neither "intoxicated" nor "demented" nor "crazy".

Petitioner, his wife, and Morris boarded the train together, entering the second coach. After the train left Reno, and while it was in motion, petitioner, Morris and Rippetoe went ahead to the smoker.[12] Petitioner and Morris sat together, petitioner next to the window, Morris on the aisle. Rippetoe took the seat just ahead. About 25 minutes out of Reno, the conductor came through the smoker, lifting tickets. Morris surrendered the tickets for his party. The conductor had passed on a step or two when petitioner, without warning, suddenly opened the window and jumped out, so fast that if was impossible for Rippetoe, Morris or the conductor to stop him. They did, however, manage to grab his coat and hold him mo-

10. All this appears from petitioner's own rather extended testimony, on both direct and cross examination.

11. Forsythe (R 730 et seq.), Wogan (R 740 et seq.), Sorensen (R 761 et seq.), Rippetoe (R 703-714).

12. R 500, 501, 571-574, 666, 667, 670, 706, 713-716, 795-798, 809, 816.

mentarily until he slipped from his coat.[13] The head brakeman was riding at the rear of the smoker (R 667, 794 et seq.). He immediately gave a stop signal and the train brakes were applied at once[14] (R 799, 803, 810-813, 819-822). His testimony was corroborated by that of passenger Buck (R 692-696). The conductor testified that he got hold of petitioner's coat collar and held petitioner until his coat tore and petitioner fell; that as soon as petitioner fell, he gave a stop signal, but by that time the train was already coming to a stop (R 829, 847-861, 677, 700).

Petitioner was immediately put on a stretcher, placed in the baggage car and rushed to Truckee.[15] Dr. Anderson, a physician called by petitioner, testified that if the bleeding was controlled (and it was)[16] no tourniquet was necessary (R 631), that time was better spent in getting petitioner to a doctor than in endeavoring to apply splints (R 631), and that open wounds, if they do not come in contact with anything, are better left exposed to the air than bandaged with material not known to be sterile (R 617-633). His testimony, with that of the other doc-

13. R 423, 424, 500, 501, 574, 669, 670, 691, 708, 717-721, 799, 816, 817, 826, 827, 843, 844.

14. The conductor estimated that petitioner was hanging out the window only "a few seconds". (R 43, 698-700.)

15. R 501, 593-595, 800-802, 830-832, 855-857. At Truckee petitioner was immediately given, by Dr. Bernard, Southern Pacific District Surgeon, such treatment as could be given with the means available in a little mountain hamlet, and was then rushed to the hospital at Reno. Dr. Bernard saved his life. (R 171, 172, 442, 612, 630 et seq., 786-789, 863 et seq., 873, 678, 789). All the doctors agreed that had Dr. Bernard attempted to operate at once the result probably would have been fatal. (R 437, 438, 633, 864.)

The petition has some suggestion that petitioner was not kept warm. Extra heat was put on in the baggage car. He was not cold. (R 590-592, 595.)

16. R 816, 855, 593, 867-870. Petitioner did not suffer from loss of blood. (R 441, 786, 787, 863-866, 871-873.)

tors, provide a complete negative to any claim of negligence in failing to give petitioner proper care.

What petitioner's mental condition actually was;[17] if abnormal, the nature of the abnormality[18]; whether respondent had notice of this;[19] whether respondent should have accepted petitioner as a passenger, and, if it accepted him, whether it should have provided an attendant,[20] hav-

17. There is no duty of special precaution unless the passenger is "incapable of taking care of himself" (*Welch v. Spokane etc. R. Co.*, 91 Wash. 260, 157 P. 679, 681), "in a helpless condition" (*Gates v. Bisso Ferry Co.*, 172 So. 829 (La. App.)), in a condition of "helplessness or incapacity" (*Louisville Ry. Co. v. Gregary's Adm'r*, 141 Ky. 747, 133 S.W. 805), "unable to care for himself" (*St. Louis etc. Ry. Co. v. Adams*, 163 S.W. 1029 (Tex. Civ. App.).)

18. According to petitioner he was in fear of harm by gangsters. His mental attitude, on his testimony, was of fearing harm and wanting to avoid it, not inviting it. (R 514-516, 574, 657, 663, 668, 672.) Compare *Chicago etc. Ry. Co. v. Sears*, 210 SW 684 (Tex. Com'n of App.).

19. It is not enough that there be some disability. The carrier must have actual knowledge of this before exercise of added care can be claimed. It is under no duty to examine. The doctrine of imputed or implied notice has no application. (*Fagerdahl v. North Coast T. Co.*, 178 Wash. 482, 35 P2d 46; *Watts v. Spokane etc. R. Co.*, 88 Ore. 192, 171 P. 901, 906; *S. P. Co. v. Buntin*, 54 Ariz. 180, 94 P2d 639; *Paris etc. Co. v. Robinson*, 104 Tex. 482, 140 S.W. 434, 439.)

Knowledge acquired only by the fact of accident is too late and immaterial. (*Welsh v. Spokane etc. R. Co.*, 91 Wash. 260, 157 P. 679, 681; *Dokus v. Palmer*, 130 Conn. 247, 33 A2d 315, 318.)

Knowledge of some unspecified disability is not enough to call for added care. The carrier must know the precise disability claimed, so that it can know what steps to take, before it is called on to take any. (*Fagerdahl v. North Coast T. Co.*, *supra*; *Chicago etc. Ry. Co. v. Sears*, note 18 above; *St. Louis etc. Co. v. Adams*, note 20 below; *Watts v. Spokane etc. R. Co.*, *supra*; *Welsh v. Spokane etc. R. Co.*, *supra*; *S. P. Co. v. Buntin*, *supra*; *St. Louis etc. R. Co. v. Dobyns*, 57 Okla. 643, 157 P. 735, 738.)

20. On petitioner's theory he was in fear of a non-existent threat from non-existent persons. What steps should respondent have taken to protect him from a threat which did not in fact exist, even assuming it did have notice of his mental condition? What

ing in mind, on both questions, that petitioner was accompanied by his wife and a male companion, both of whom were apparently fully able to give any care that might be necessary;[21] whether any other attendant could have prevented petitioner from going out the window when Rippetoe, Morris and the conductor could not; whether the train could have been stopped sooner and, if it could, whether any assumed delay was negligence or caused injury; and whether, in the circumstances of emergency, other steps should have been taken to care for plaintiff, although those taken saved his life; all these questions have been resolved by the jury.

The cases closest on their facts are *Chicago etc. Ry. Co. v. Sears*, 210 S.W. 684 (Tex. Com'n App.) and *St. Louis etc. Ry. Co. v. Adams*, 163 S.W. 1029 (Tex. Civ. App.). In both the passenger was unaccompanied. Both held that as **matter of law** there could be no recovery.

Shortly before the case went to trial, petitioner initiated an attack on the jury panel. Stripped of invective and

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could it reasonably anticipate would develop from a non-existent state of facts? (Compare *Chicago etc. Ry. Co. v. Sears*, note 18 above and *St. Louis etc. Ry. Co. v. Adams*, 163 SW 1029 (Tex. Civ. App.).)

A carrier "is bound to guard only against those occurrences which can be reasonably anticipated" and a "reasonable man * * * will neither neglect what he can foresee as probable, *nor waste his anxiety on events that are barely possible*". (*Atchison etc. Co. v. Calhoun*, 213 U.S. 1, 9, 53 L. ed. 671, 675; *Kansas City So. Ry. Co. v. Pinson*, 23 F2d 247 (CCA 5).)

21. Where a passenger is accompanied by an apparently competent attendant the carrier is under no duty to displace that attendant with another. (*Gates v. Bisso Ferry Co.*, note 17 above; *Boyd v. Alabama etc. Co.*, 111 Miss. 12, 71 So. 164 and 655; *Olson v. Minn. etc. R. Co.*, 43 N.D. 371, 175 N.W. 371. Cf. *Fagerdahl v. North Coast T. Co.*, note 19 above; *So. Ry. Co. v. Hayne*, 209 Ala. 186, 95 So. 879; *Arnett v. C. & O. Ry. Co.*, 198 Ky. 742, 248 SW 1040; *L. & N. R. Co. v. Dyer*, 152 Ky. 264, 153 SW 194.)

epithet petitioner's claim comes to this: There were no "laboring" people on the jury panel.[22]

Assuming that the negro exclusion cases extend to every economic group, social class, religious sect, etc. to which a party may claim to belong, and that petitioner is a member of a class so distinct as to fall within the assumed extension of the rule, still, petitioner has not shown any impropriety in drawing the jury panel.

To make his point, petitioner must show that there had been "a systematic and arbitrary exclusion" of the class to which he belongs; an exclusion of otherwise eligible jurors "solely because of their membership in that class". (*Hale v. Kentucky*, 303 U.S. 316, 317, 82 L. ed. 1050, 1052.) He was required to show a "systematic or arbitrary exclusion of, or discrimination between," persons of a particular class. (*Wong Yim v. U. S.*, 118 F2d 667 (CCA 9, cert. den. 313 U.S. 589, 85 L. ed. 1544).) He was not entitled to have a jury made up to suit him. He had no right of *inclusion* on the panel of any particular person or classes of persons. The right is only against systematic and arbitrary *exclusion* of qualified and non-exempt persons. (*Martin v. Texas*, 200 U.S. 316, 320, 50 L. ed. 497, 499; *Thomas v. Texas*, 212 U.S. 278, 281, 53 L. ed. 512, 513; *Virginia v. Rives*, 100 U.S. 13, 25 L. ed. 667, 671; *Neal v. Delaware*, 103 U.S. 370, 394, 46 L. ed. 567, 573; *Brush v. Kentucky*, 107 U.S. 110, 117, 27 L. ed. 354, 357; *Shibuya v. Gugiro*, 140 U.S. 291, 297, 35 L. ed. 510, 513; *Franklin v. South Carolina*, 218 U.S. 161, 167; 54 L. ed. 980, 985.)[23]

22. In the court below the attack amounted to an attack on the integrity of the Clerk and Jury Commissioner.

23. *A fortiori* he is not entitled to a panel or jury made up of given proportions of persons of various classes. *Thomas v. Texas*, *Virginia v. Rives* and *Wong Yim v. U. S.*, all cited in the body and *Beckett v. U. S.*, 84 F2d 731, 732 (CCA 6).

Those charged with getting up the panel cannot anticipate every class to which litigants will claim to belong,—cannot know the make-up of litigants whose actions may not yet have been filed,—and construct a panel accordingly. For this reason, and for the reason that the rule is not one of inclusion, but is only one prohibiting arbitrary and systematic exclusion, it is a matter of no significance that on a particular panel there may be no members of a particular class. (In addition to the cases just cited see also *Ruthenberg v. United States*, 245 U.S. 480, 60 L. ed. 419; and *Beckett v. U. S.*, 84 F2d 731, 732 (CCA 6).)

If the requirements just noticed has been observed "the officials charged with choosing Federal jurors may exercise some discretion to the end that competent jurors may be called". (*Glasser v. United States*, 315 U.S. 60, 85, 86 L. ed. 680, 707; *Walker v. United States*, 93 F2d 383, 391 (CCA 8,—cert. den. 303 U.S. 644, 82 L. ed. 1103, reh'g. den. 303 U.S. 668, 82 L. ed. 1124). Cf. *Franklin v. South Carolina, supra.*)

Petitioner had the burden of showing a systematic and arbitrary exclusion of eligible talesmen solely because they belonged to a particular class. Unless violation were "expressly shown" proper selection of the panel "may be taken as sufficiently established by the presumption of regularity". (*Lewis v. United States*, 279 U.S. 63, 73, 73 L. ed. 615, 619; *Walker v. United States, supra.*)[24] And, in addition, on appeal, where the matter was heard in open court, on testimony taken, the usual rule that determina

24. Acc. *Carroll v. U. S.*, 16 F2d 951, 955 (CCA 2—cert. den. 273 U.S. 763, 71 L. ed. 880); *Needham v. U. S.*, 73 F2d 1, 2, bot. col. 2 (CCA 7—cert. den. 294 U.S. 705, 79 L. ed. 1241); *Kie v. U. S.*, 27 F. 351, 357 (C.C. Ore.).

tion of questions of fact will not be reviewed, applies, and every intendment is in favor of the ruling of the trial court. (Cf. *Thomas v. Texas, supra.*)

The claims of showing now urged are (1), an affidavit of petitioner's counsel and (2) testimony at a hearing before the trial judge, given principally by the Clerk and the Jury Commissioner.

The affidavit of petitioner's attorney must be disregarded. (1) The affidavit is inherently defective. It is only hearsay, irrelevancies and unsupported conclusions.[25] (2) Objections to the affidavit were made but were not ruled on because the affidavit was never offered in evidence[26] (R 69-138). (3) In any event affidavits cannot be used to support a challenge to the array in the absence of a stipulation. (*Glasser v. U. S.*, 315 U.S. 60, 87, 87 L. ed. 680, 708; *Martin v. Texas*, 200 U.S. 316, 50 L. ed. 497; *Smith v. Mississippi*, 162 U.S. 592, 600, 40 L. ed. 1082, 1085; *Manaux v. U. S.*, 264 F. 816 (CCA 6).) There was no stipulation.

The only testimony taken at the hearing which had any relevancy was that of the Clerk, his deputy, and the Jury Commissioner. This showed how the panel was gotten up:

From City Directories were taken the names of people who, from occupation and residence, it appears, would make intelligent jurors (R 85). With what organization or com-

25. Affidavits are subject to the usual rules of evidence. *Pandolof v. U. S.*, 286 F. 8, 20 (CCA 7—cert. den. 261 U.S. 621, 67 L. ed. 831); *Willis v. Lauridson*, 161 Cal. 106, 108, 118 P. 530; *Mason v. San-Val etc. Co.*, 1 C2d 666, 672, 36 P2d 620; *Bull v. Power Co.*, 87 N. J. Eq. 1, 99 A. 111, 114; *Union etc. Bk. v. Kolpenitsky*, 125 N. J. Eq. 125, 4 A2d 413, 415; 2 C.J.S. 987 (Affidavits, §28, a, (2)).

26. And so cannot be considered. *Melde v. Reynolds*, 120 Cal. 234, 52 P. 491.

pany they were associated did not enter into the selection (R 86), they were never selected because of occupation (R 86)[27] and no attempt was made to select business executives[28] (R 96, 97). No names of persons known to be disqualified were taken (R 105). The names endeavored to be avoided were those of people who were disqualified, exempt, or who surely would be excused by the court (R 86, 105, 106, 114).[29] Laborers, or wage earners, or working men, were not left out as a class;[30] they were taken, whatever the character of their work and whatever their occupation, if they were employed at a monthly rate or otherwise so situated that by serving they did not suffer a financial loss which they could not afford (R 87, 88, 96,

27. Occupation may be noticed as some guide to age. If a man is working as a clerk for a department store, he is probably of the right age to serve, but "that is the only way that I can recall now that the occupation would have anything to do with it" (R 86, 87). Of course, where there is a connection with a firm known to be reputable, this knowledge is not disregarded; it is assumed that a person connected with a reputable firm is a reputable person (R 97).

28. Some business executives were selected, but so were other employees of business concerns. In speaking of business men the reference was not solely to executives (R 98). See note 33 below.

29. Among the classes specified as disqualified, exempt or who would surely be excused by the court were physicians, pharmacists, railroad telegraphers, school teachers, ministers, State and Federal officials and people in such classes. Compare *Rawlins v. Georgia*, 201 U.S. 638, 50 L. ed. 899, quoted below.

30. Among the people avoided because they were always excused by the court were *certain* "laborers" or "wage earners" or "working men"; but only certain of them,—only those who worked for a *daily* wage and *for whom service would represent a severe financial loss and who, for this reason, were excused by the court* (R 87, 88, 89, 91, 110, 111). The testimony makes it abundantly clear that this statement applies only to certain working men or wage earners; to those who work at a daily wage, cannot forego the daily wage and who, for this reason, are always excused by the court (R 87, 104-106, 111). Compare *Rawlins v. Georgia* 201 U.S. 638, 50 L. ed. 899, below.

109, 110).[31] Indeed, the Commissioner testified that he had made a special effort to obtain the names of people who were members of labor unions (R 110, 111, 113).

No attention was paid to the financial status—indeed, this was not known (R 106, 107, 108, 114, 115). No attention was paid to the proportion of women, i.e., there was no attempt either to raise the proportion up or hold it down (R 91, cf. 112), and no discrimination was made among women because of their husband's occupations (R 106, 107). There have been negroes and Chinese on the panels (R 91, 92).

> "Now, has there been any purposeful exclusion of negroes or Chinese? A. No.
>
> Q. Has there been any purposeful exclusion of men who worked with their hands, just because they worked with their hands? A. Never.
>
> Q. Or any exclusion of men of small salary, whether by day, or otherwise, simply because their salaries were small?
>
> A. Never.
>
> Q. Has there ever been any exclusion of any person simply because he was poor? A. Oh, no.
>
> Q. Has there ever been any exclusion of any individual who worked at any particular trade, simply because he worked at that trade? A. No." (R 103, 104.)

> "Q. As I understand you, you paid no attention whatever to whether the prospective jurors were

31. A man was not left out who was a carpenter. He might not be a day laborer, but on a monthly wage. That he was a carpenter would not indicate that he was dependent on daily labor. A janitor would be selected. Janitors have been on juries a number of times. A man would not be left out because he was a mechanic (R 87-89). All wage earners and laboring people are not left out (R 96). If a man were listed as a laborer, he could serve if he wanted to serve (R 110).

wealthy or poor, in fact you knew nothing absolutely about their financial condition, is that correct?

A. I don't know a thing about their financial condition.

Q. And have never attempted to make any selection based on their financial standing? A. Never.

Q. And the same goes with respect to the women, you have never attempted to make any selection of women based on whether their husbands were engaged in one line of endeavor or another line of endeavor?

A. That is correct.

Q. Or whether they were rich or poor? A. That is correct.

Q. You just pick them as they come? A. Yes." (R 107, 108.)

"Q. Have you ever excluded or attempted to exclude any person or class of persons because of the nature of the work they do? A. No.

Q. Or because of the amount of pay they receive? A. No.

Q. Or because of their wealth? A. No." (R 114.)

In actual operation about 50% of the panel could be classified as business men or business people[32] (connected with or employed by[33] business concerns) and the other 50%, more or less, belonged in other classes (R 90, 91, 95, 96, 109, 115, 119, 123).[34] How a jury panel could be gotten

32. See note 28 above.

33. This would include "laboring" people employed by business concerns large and small. R 96, 109) "If you mean by that that I went out of my way to select a large number of officers of companies, if that is what you mean by an executive, I never have done that."

34. The Commissioner testified: "I have tried to keep away from the business end"; that about 50% were "connected with some business concern probably". See notes 28 and 33 above.

up without at least such a proportion of people connected in some capacity with business concerns, even large business concerns, where the court is so located that travel distance for a juror to and from the court must be within the metropolitan area of San Francisco, is not apparent.

The only persons excluded were those who were disqualified, exempt, or who surely would be excused by the Court on the ground of hardship. This practice is one expressly approved in *Rawlins v. Georgia*, 201 U.S. 638, 640, 50 L. ed. 899, 900:

> "The nature of the classes excluded was not such as was likely to affect the conduct of the members as jurymen, or to make them act otherwise than those who were drawn would act. The exclusion was not the result of race or class prejudice. It does not even appear that any of the defendants belonged to any of the excluded classes. The ground of omission, no doubt, was that pointed out by the state court—that the business of the persons omitted was such that either they would have been entitled to claim exemption, or that probably they would have been excused. Even when persons liable to jury duty under the state law are excluded, it is no ground for challenge to the array, if a sufficient number of unexceptional persons are present."

The Clerk and the Jury Commissioner proceeded in the only way they could proceed. To have a panel such as that for which appellant argues would impose the duty, neither contemplated nor possible of fulfillment, of studying every litigant to know each shading of race, religion,

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"Q: In your selection, do you omit from the jury list wage earners and laborers? A: No." (R 109.). A person listed as a labor would be selected. (R 110.).

political thought and occupation, and of then selecting like jurors. It would require a panel having every possible shade of racial background, religious faith, political conviction, financial standing, education and training, and occupation and economic endeavor. If a railroad were a party it would be necessary to have people who were not in the shipper or passenger class. And if remote "connections" disqualify, then in an action in San Francisco against the Pacific Gas & Electric Company or the Telephone Company, it would be impossible to get a jury. (But see *Roberts v. Public Service Co.*, 17 F. Supp. 63 (N.H). Cf. *U. S. v. Wood*; 299 U.S. 123, 81 L. ed. 78.)

Practical government calls for practical measures. If the measures are fairly conceived and honestly carried out no one can complain because they do not fit exactly his personal peculiarities. Congress conceived the measures and the Clerk and the Jury Commissioner fairly and honestly carried them out.

Since it is the method of selection and not the actual composition of a particular panel that is controlling, no time need be spent on this panel. But it is interesting that there was no showing that there was an exclusion from the panel in question of persons of the type petitioner claims should have been included. *The composition of this panel was not shown.* There was no evidence of it. All that appeared, as to the composition of the panel, was what appeared from the prospective jurors who happened to be called into the box for this case. This is no place to cover petitioner's misstatements in this regard. It is sufficient to call attention to the remarks of the trial judge made after the jury was impaneled (R 494) and again at

the time he denied petitioner's motion for new trial, when he made a complete and careful analysis of the jury (R 308-312). Such connection as any juror had with respondent was not shown to be more than that he or the concern with which he was connected was a passenger or shipper by railroad. *Every juror who served was passed for cause.* Every challenge for cause interposed by petitioner was sustained, some of them improperly we believe.

It is respectfully submitted that the petition should be denied.

Dated at San Francisco, California,
September 10, 1945.

ARTHUR B. DUNNE,
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